United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7539

TO BE ARGUED BY:
RICHARD J. HILLER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B
P/S

DOCKET NO. 76-7539

ANDRIANA SANCHEZ, et al., individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

-against-

EDWARD MAHER, et al., individually and as Commissioner of the Department of Social Services of the State of Connecticut,

Defendants-Appellants,

-and-

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, et al.,

Defendants-Appellees

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QUESTION PRESENTED

Whether the District Court erred in adopting in its Order of September 2, 1976, after considering extrinsic evidence, the interpretation shared by the Department of Health, Education, and Welfare (HEW), the plaintiffs, and the Commissioner of the Connecticut Department of Social Services (CWD) of a disputed term of a Stipulation, approved by the District Court, between HEW and CWD.

STATEMENT OF THE CASE

On April 18, 1973, the plaintiffs brought this suit on behalf of all Spanish-speaking welfare recipients in Connecticut, alleging discrimination by the Connecticut Welfare Department, now called the Connecticut Department of Social Services (referred to herein as "CWD")in the provision of services to the class of plaintiffs. The Department of Health, Education, and Welfare (hereinafter "HEW") was also named as a party defendant, the plaintiffs alleging that HEW had failed to enforce Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. (App. 2a, 30a-33a)

Subsequent to the commencement of this action, an investigation conducted by the HEW Office for Civil Rights culminated in its finding on August 31, 1973 that CWD was not in compliance with Title VI because of its failure to hire and properly utilize a sufficient number of Spanish-speaking workers. (Tr. 4-5, 4-19-76)

Following extensive discovery efforts by HEW and the plaintiffs (App. 3a-11a), numerous meetings amongst the parties in the chambers of the District Court (App. 3a-7a), and the denial by the District Court of CWD's motion to dismiss the complaint on June 3, 1974 (App. 9a), HEW and CWD entered into a Stipulation which was "approved" by the District Court, "absent objections," on June 3, 1974 and filed on June 10, 1974. (App. 9a, 36a-38a)

Discussions then followed between HEW and the plaintiffs. Predicated on the HEW-CWD Stipulation, the attorneys for plaintiffs and HEW entered into a second stipulation in which HEW agreed to monitor enforcement of the HEW-CWD Stipulation, and by which the action would be dismissed against HEW without prejudice. This stipulation was "approved and so ordered" by the District Court on July 11, 1974. (App. 39a-42a)

The HEW-CWD Stipulation (hereafter the "Stipulation"), obliged CWD to "immediately seek to hire ten (10) additional all-purpose bilingual English-Spanish workers" (paragraph 1), and to "proceed to hire ten (10) additional [Spanish-speaking] professional workers in the Social Services" (paragraph 2). (App. 36 a) CWD also agreed to implement a reporting system and an allocation plan to insure that Spanish-speaking clients would find Spanish-speaking workers routinely available. (App. 37a-38a)

Dissatisfied with the progress toward implementation of the hiring requirements of the Stipulation, the plaintiffs on August 29, 1975 moved to reinstate HEW as a party defendant for the limited purpose of enforcing the Stipulation. (App. 11a) A hearing on plaintiffs' motion was held before the District Court on November 12, 1975. (App. 12a) Insofar as HEW established January 1, 1976 as a final date for full compliance with the Stipulation, the District Court held in abeyance plaintiffs' motion until January 5, 1976. (App. 12a)(Tr. 7, 4-19-76)

On that date, CWD having failed to fully meet the hiring requirements of the Stipulation, HEW moved to have itself reinstated as a party defendant for the purpose of enforcing the Stipulation, and the District Court ordered HEW's reinstatement. (App. 12a-13a)

As of February, 1976, the pertinent hiring requirements of the Stipulation were not in dispute. (Tr. 148-149, 166, 4-27-76) HEW, the plaintiffs, and CWD's Commissioner Maher all agreed on the meaning of the Stipulation's hiring requirements. (App. 118a-120a) (Tr. 167, 4-27-76) Not until April, 1976, just before he testified in the proceedings below, did Commissioner Maher's interpretation of the hiring requirements of the Stipulation change from that previously held by him and all the parties. In April,1976 he read the Stipulation for the first time, so it is claimed. (Brief of Appellants, pp. 8,23).

On July 18, 1975 Commissioner Maher met with HEW officials to discuss CWD's compliance with the Stipulation. (App. 72a-73a) At that meeting Commissioner Maher accepted HEW's interpretation of the Stipulation which required CWD to fill the Spanish-speaking worker vacancies existing when the Stipulation was signed, as well as hire the ten additional all-purpose bilingual workers. (App. 73a; 102a-104a) By letter dated August 15, 1975 to HEW, Commissioner Maher re-

affirmed his acceptance of HEW's interpretation stating:

> I understand that in addition to these ten (all purpose bilingual) workers, there were twelve vacancies for bilingual workers existing at the time the stipulation was signed and that these too should be filled. (App. 74a)

Elsewhere in the August 15 letter Commissioner Maher stated that CWD would fill the balance of the ten additional all-purpose workers to be hired and "also fill the twelve vacancies existing in July, 1974." (App. 75a) Again, by letter dated December 31, 1975 to HEW, Commissioner Maher reiterated his understanding of the Stipulation and his acceptance of HEW's interpretation.* (App. 115a-116a) (Tr. 177-178, 4-27-76)

CWD now seeks to explain away and renounce Commissioner Maher's own interpretation of the Stipulation expressed in his August 15 and December 31, 1975 letters, and thereby avoid compliance with the Stipulation, now two and one-half years overdue.

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* Commissioner Maher in his December 31, 1975 letter stated that "seventy-seven bilingual, all-purpose workers, seven less than required by the stipulation...had been hired." (App. 115a) (Tr. 177, 4-27-76) In accepting the requirement of 84 all-purpose bilingual workers (App. 116a), Commissioner Maher reaffirmed his understanding of the Stipulation, consistent with that of HEW and the plaintiffs, that Spanish-speaking vacancies existing when the Stipulation was signed were to be filled. The numerical requirement of 84 all-purpose bilingual workers was arrived at by adding to the 62 Spanish-speaking workers on staff at the time the Stipulation was signed, the 12 vacancies then existing, and the "ten (10) additional" workers required by the Stipulation.

ARGUMENT

POINT I

THE DISTRICT COURT DID NOT ERR IN CONSIDERING EXTRINSIC EVIDENCE AS AN AID TO INTERPRETING PROVISIONS OF THE STIPULATION WHICH WERE NOT WHOLLY UNAMBIGUOUS

Central to this appeal is the disputed interpretation of a provision of the Stipulation, and, more specifically, the intent behind and the meaning of the term "ten (10) additional," in paragraph 1 of the Stipulation.

The language "ten (10) additional" is not wholly unambiguous and is fairly susceptible to at least two different interpretations. First, the interpretation of HEW, the plaintiffs, CWD Commissioner Maher (up through April, 1976), and the Court. Their construction of "ten (10) additional" required CWD to hire ten all-purpose bilingual workers in addition to filling any vacancies in Spanish-speaking all-purpose positions existing at the time the Stipulation was signed. Second, the interpretation of CWD's counsel that the Stipulation did not require the filling of the existing Spanish-speaking vacancies.*

CWD asserts on appeal for the first time that reliance should have been placed exclusively on the Stipulation in construing its meaning. CWD interposed no objections to

* It is not disputed that twelve (12) Spanish-speaking all-purpose vacancies existed at the time the Stipulation was filed. (Brief of Appellant, p. 7)

the admissibility of the extrinsic evidence offered by HEW and the plaintiff at the hearing to clarify the ambiguity in the Stipulation. To the contrary, CWD proffered extrinsic evidence of its own, documents and testimony, to buttress its interpretation of the Stipulation. CWD's counsel in making his offer of proof (Tr. 19-24, 4-19-76) describes the evidence he intended to rely on to show the meaning of the Stipulation---depositions, letters, answers to interrogatories---all extrinsic to the Stipulation. Indeed, CWD's counsel himself testified as a witness, offering his own testimony as evidence of the intent of the parties to the Stipulation.* All this can only be taken as a confession of ambiguity by CWD.** At no time did CWD's counsel argue that the evidence offered should not be considered by the Court on the ground that the Stipulation was wholly unambiguous, and subject to only one interpretation.

*The decision of CWD's counsel to call himself as a witness (Tr. 18, 26, 4-19-76) "inevitably confus[ed] the distinction between advocate and witness, argument and testimony," U.S. v. Schwartzbaum, 527 F. 2d. 249, 253 (2d. Cir. 1975).

**Not surprisingly, while CWD argues that the Stipulation is clear and unambiguous, it does not challenge, nor mention, other ambiguities of the Stipulation resolved by the District Court in CWD's favor. The matter of the base figures (that is, the numbers of bilingual all-purpose and professional workers employed by CWD when the Stipulation was signed), a subject of much controversy below, is not discussed. Nor, has CWD raised the issue whether temporary federally funded bilingual employees could be included in counting the "ten (10) additional" workers, another ambiguity also resolved by the District Court in favor of CWD.

While it is correct that where the intent and meaning of a writing is wholly unambiguous resort to extrinsic evidence is improper, it is equally settled that where a writing is ambiguous extrinsic evidence is admissible to clarify the ambiguity. Heyman v. Commerce and Industry Insurance Co., 524 F.2d 1317, 1320 (2d. Cir. 1975); Home Ins. Co. v. Aetna Cas. & Sur. Co., 528 F.2d 1388, 1390 (2d. Cir. 1976); Gladstone v. Fireman's Fund Ins. Co., 536 F. 2d 1403,1406 (2d. Cir. 1976); Asheville Mica Co. v. Commodity Credit Corp., 335 F.2d 768, 770 (2d.Cir. 1964); Spencer, White & Prentis Inc. of Conn. v. Pfizer, Inc., 498 F.2d 358, 363 n.23 (2d. Cir. 1974); Baldt Corp. v. Tabet Mfg. Co., Inc., 412 F. Supp. 249, 254 (S.D.N.Y. 1974) affirmed, 517 F.2d 1395 (2d. Cir. 1975); Corbin on Contracts, Sec. 542.

If the disputed language of the Stipulation "may reasonably be construed in more than one sense" then it is ambiguous within the meaning of the parol evidence rule, and consideration of extrinsic evidence is permissible. Union Insurance Soc. of Canton, Ltd. v. William Gluckin & Co., 353 F.2d 946, 951 (2d. Cir. 1965); Heyman v. Commerce and Industry Insurance Co., supra. Even defendant CWD Commissioner Maher admitted the ambiguity in the Stipulation when he testified that "...in our review of the situation two days

ago [April 25, 1976], we [defendants] discussed different interpretations of the stipulation." (App. 117a) (Tr. 179-180, 4-27-76) The District Court properly noted that there were several interpretations of the contested language in the Stipulation (App. 114a) (Tr. 167, 4-27-76), and committed no error in considering extrinsic evidence.

POINT II

THE DISTRICT COURT'S INTERPRETATION OF THE STIPULATION IS NOT CLEARLY ERRONEOUS

There is no controversy with respect to the basic facts. Rather the issue on appeal relates to the District Court's interpretation of the Stipulation and various extrinsic evidence. The question of interpretation of the extrinsic evidence is for the trier of fact, here the District Court. Gladstone v. Fireman's Fund Ins. Co., supra at 1407. Unless the District Court's interpretation of the Stipulation is clearly erroneous it should not be disturbed by this Court. Rule 52a, F.R. Civ. P.; McAllister v. United States, 348 U.S. 19 (1954); Coalition for Ed. In Dist. 1 v. Board of Elec., City of N.Y., 495 F.2d 1090, 1093-94 (2d. Cir. 1974); Mente and Co., Inc. v. Isthmian S.S. Co., et al., 122 F.2d 266 (2d. Cir. 1941); U.S. v. Alders Creamery, 107 F.2d 987 (2d. Cir. 1940).

The District Court, after two days of hearings, arrived at its interpretation of the disputed language of the Stipulation, stating:

> Based on the moving papers,based on the testimony, based on the Court's own familiarity with this case, based on what the Court interprets to be the intent of the parties, the Court has concluded that the interpretation on the stipulation as set forth by HEW and the plaintiffs and the Commissioner is the one the Court will accept. (Tr. 25, 4-27-76)

CWD seeks to justify the Commissioner's belated disavowal of his original interpretation of the Stipulation by arguing that the Commissioner was unfamiliar with the case when he accepted HEW's interpretation of the Stipulation, that he had not read the Stipulation until April, 1976, and that he did not have the benefit of his counsel's advice. (Brief of Appellant, pp.8, 22-25)

Although Commissioner Maher was not the Commissioner of CWD when the Stipulation was signed, he relied for information concerning the Stipulation on his Chief of Policy, Caroline Packard (App. 101a) (Tr. 157, 4-27-76) who was thoroughly familiar with the lawsuit.(Tr. 199-200, 4-27-76) In preparation for the July 18, 1975 meeting with HEW, Commissioner Maher familiarized himself with the case (App. 101a) (Tr. 157, 4-27-76), and with the knowledgeable Caroline Packard by his side (Tr. 185, 4-27-76) accepted HEW's interpretation of the Stipulation at that meeting. (App. 102a) (Tr. 161, 4-27-76) The Commissioner's August 15, 1975 letter was prepared by the same Caroline Packard upon whom the Commissioner continued to rely. By December 31, 1975 he had a full understanding of the Stipulation (App. 115a) (Tr. 177-178, 4-27-76) having "entered the case on a personal basis." (App. 116a) (Tr. 178, 4-27-76)

Neither Caroline Packard nor his counsel advised Commissioner Maher that his original interpretation of the Stipulation was erroneous. (App. 177a) (Tr. 179-180, 4-27-76)

In fact, the Commissioner testified, he had no reason not to believe that HEW's interpretation of the Stipulation was correct (Tr. 165, 182, 4-27-76) Indeed, Commissioner Maher stated that he was not concerned as late as February, 1976 because he believed the CWD was in compliance with the Stipulation's hiring requirements as interpreted by HEW. (App. 116a, 118a, 120a) (Tr. 178, 182, 184, 4-27-76) This is further support for the reasonableness of the original construction placed on the Stipulation by the Commissioner, and ultimately by the Court.

To adopt CWD's eleventh hour interpretation of the Stipulation would have required the District Court to accept the illogic of HEW agreeing to require CWD to hire only ten more all-purpose bilingual workers at a time when there existed twelve vacancies for such positions. This the District Court properly refused to do. (App. 119a)(Tr. 183, 4-27-76)

CWD's claim that the Stipulation was drawn by HEW, and merely signed by CWD is not supported by the record. The disputed language---"ten additional"---was first proposed by CWD. On March 29, 1974 Nicholas Norton then Commissioner of CWD wrote to HEW and stated that he was "making a final offer to HEW in order to reach an amicable settlement." (App. 78a) The letter provided in pertinent part: "We are

willing to immediately seek to hire ten (10) additional all-purpose bilingual English-Spanish workers for our department." (App. 78a) "We will also proceed to hire ten (10) additional workers in the Social Services." (App. 78a) Even were the Stipulation drawn by HEW this alone would not "foreclose the use of parol evidence to resolve the ambiguity." Spencer, White & Prentis Inc. of Conn. v. Pfizer, Inc., supra. The record supports the construction placed on the Stipulation by the District Court. In any event, the District Court's interpretation is not clearly erroneous.

POINT III

THE DISTRICT COURT DID NOT ERR IN EXCLUDING THE TESTIMONY OF MR. FISH, AN HEW ATTORNEY

Having permitted CWD's attorney to call himself as a witness to testify, the District Court properly refused CWD's attempt to call an HEW attorney, Mr. Fish, as a witness as well. (App. 121a) (Tr. 192-193, 4-27-76) "As a general rule a party's attorney should not be called as a witness unless his testimony is both necessary and unobtainable from other sources." U.S. v. Crockett, 506 F. 2d 759, 760 (2d. Cir. 1975) cert. denied 423 U.S. 824. Mr. Fish's testimony clearly was not necessary. CWD sought to elicit from Mr. Fish testimony that HEW had prepared the Stipulation, and that "vacancies" were not mentioned in any writings prior to the signing of the Stipulation. This testimony had previously been elicited from other sources, including CWD's attorney himself. The District Court had this testimony before it, but rightly refused to draw the inferences desired by CWD. The exclusion of Mr. Fish's testimony was not erroneous.

Assuming arguendo that the exclusion was erroneous, CWD has not demonstrated that it was prejudicial. Errors during the course of a trial which do not affect the substantial

rights of the parties are to be disregarded on appeal, 28 U.S.C. § 2111, Rule 61 F.R. Civ. P.; United States v. Heyward-Robinson Company, 430 F.2d 1077, 1083 (2d. Cir. 1970); Severi v. Seneca Coal and Iron Corporation, 381 F.2d 482, 489 n.7 (2d.Cir. 1966). Any error which is not prejudicial to the appellant is not reversible error. Ross v. American Export Isbrandtsen Lines, Inc., 453 F.2d 1199, 1202 (2d. Cir. 1972).

In determining whether the exclusion of evidence is prejudicial, this Court will not reverse on the mere possibility that the exclusion was harmful to CWD. Fortunato v. Ford Motor Company, 464 F.2d 962, 967 (2d. Cir. 1972). The burden is on CWD to show that prejudice resulted, Palmer v. Hoffman, 318 U.S. 109, 116 (1943), Fortunato v. Ford Motor Company, supra, by demonstrating that on the entire record, the exclusion affected its substantial rights. Ross v. American Export Isbrantsen Lines, Inc., supra, at 1201. Where there is ample evidence in the record, the exclusion of minor evidence which is highly unlikely to change the result, is harmless within the purview of 28 U.S.C. § 2111, Rule 61 Fed. R. Civ. P. and is not grounds for reversal. Vitarelle v. Long Island RR Co., 415 F.2d 302 (2d. Cir. 1969).

Even where it might have been better to admit excluded evidence, the exclusion will be held to be harmless if other testimony has already been admitted on the same subject. Savard v. Marine Contracting, Inc., 471 F.2d 536, 543 (2d. Cir. 1972); DiMeo v. Minster March Co., 388 F.2d 18, 20 (2d. Cir. 1968); Bauman v. Kaufman, 387 F.2d 582, 587 (2d. Cir. 1967).

CWD simply has not shown that the excluded evidence was of crucial importance, a showing that must be made if a mistake by a trial court is to found reversible error. Bauman v. Kaufman, supra, at 589.

CONCLUSION

For all of the foregoing reasons the September 2, 1976 Order of the District Court should be affirmed.

Dated: New York, New York
January 28, 1977

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CERTIFICATION

This is to certify that on the 28th day of January, 1977, a copy of the Plaintiffs-Appellees' Brief was mailed to the following counsel of record:

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